

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. BOBBY MATHIS

Direct Appeal from the Criminal Court for Hancock County
No. 05-CR-2571 James E. Beckner, Judge

No. E2006-00332-CCA-R3-CD - Filed November 27, 2006

The defendant, Bobby Mathis, was convicted by a Hancock County Criminal Court jury of delivery of a Schedule II controlled substance, a Class C felony, and was sentenced by the trial court as a Range II multiple offender to ten years in the Department of Correction. Following the denial of his untimely filed motion for a new trial, the defendant filed an untimely notice of appeal to this court in which he argues that the evidence was insufficient to sustain his conviction; the trial court erred by admitting an inaccurate transcript of the tape recording of the undercover drug transaction; his Sixth Amendment right to confront witnesses was violated by the admission of the tape recording, which contained the voice of his wife, who was deceased by the time of his trial; his due process rights to a fair trial were violated by his appearance before the jury in prison attire; the trial court erred by granting the State's motion not to disclose the last name of the confidential informant; and he received an excessive sentence. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

Edward H. Moody, Assistant Public Defender, for the appellant, Bobby Mathis.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; C. Berkeley Bell, District Attorney General; and Connie Trobaugh, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On November 18, 2004, Special Agent Tommie Morelock of the Tennessee Bureau of Investigation ("TBI") made an undercover purchase of twenty Oxycodone tablets from the

defendant's wife, Janice Helmick, at her residence in Hancock County. The defendant, who was home on furlough from prison to attend the funeral of Helmick's son, participated in the transaction by, among other things, physically handing the tablets to Agent Morelock. He was subsequently indicted by the Hancock County Grand Jury for one count of delivery of a Schedule II controlled substance.¹

Before the start of the defendant's December 7, 2005, trial, the trial court, noting that the defendant had not exercised his right to dress in civilian clothing, instructed the venire members that they were not to hold the defendant's attire against him in any way. After the trial court had received assurances from the venire members that they would make no presumptions about the defendant's guilt, the trial continued with the selection and impaneling of the jury and the State's presentation of its evidence.

The State's first witness was TBI forensic chemist Celeste White, who testified that she determined that the tablets contained Oxycodone, a Schedule II controlled substance. She said that Oxycodone was the chemical name of the drug, but the tablets were known by the name "Oxycontin." On cross-examination, she acknowledged that it was possible that the drug, which she described as a strong pain reliever, was prescribed for cancer patients.

TBI Special Agent Mike Finley testified that he was assigned to the drug investigative division on November 18, 2004, and assisted in Special Agent Tommie Morelock's undercover drug transaction with the defendant and his wife by, among other things, recording the transaction. On cross-examination, he acknowledged that he had never seen the defendant before the date of the sale and was therefore unable to identify his voice on the recording.

TBI Special Agent Tommie Morelock testified that his duties involved conducting narcotics investigations, including undercover operations. He said that a confidential informant had previously introduced him to the defendant's wife, Janice Helmick, and on November 18, 2004, he went to her mobile home to purchase Oxycontin tablets from her. When he pulled up in front of the home, he saw the defendant standing on the porch talking to two or three other individuals who were in the front yard. He walked up to the defendant, engaged him in a short conversation, and asked if Helmick was at home. The defendant told him that she was inside the trailer and instructed him to go in. He walked inside and Helmick came out of a back bedroom, sat down across from him, and asked if he wanted to buy some "Oxy's," meaning Oxycontin. When he told her yes, she yelled for the defendant, who came inside and went with her to the back bedroom.

Agent Morelock testified that he looked down the hallway and saw the defendant and Helmick with their backs turned toward him "counting out some pills" in the back bedroom. He sat down and the two returned from the bedroom. Helmick sat down across from him and the defendant handed him twenty, ten-milligram Oxycontin tablets. As he recalled, Helmick said, "I

¹ According to defense counsel, Helmick was indicted for the sale of a Schedule II controlled substance but died of cancer on November 12, 2005, before either her case or the defendant's case was brought to trial.

would prefer him hand you the pills, I don't know you." Agent Morelock said that he counted the pills twice and then asked for a cigarette pack or plastic baggie to put them in. Helmick told him she had a cigarette pack in the bedroom and asked the defendant to retrieve it, but the defendant instead gave him the cellophane pack from a package of cigarettes that he had. Agent Morelock stated that he put the tablets in the cellophane pack, rolled it up, and placed it in his boot. He then paid Helmick two hundred dollars in pre-recorded funds, based on the price she had quoted to him of one dollar per milligram. After leaving the premises, he sealed the tablets in an evidence envelope and transported them to the TBI laboratory for analysis.

Agent Morelock testified that he had not met the defendant prior to the date of the drug sale and that he was not the target of his investigation. He said that Helmick told him that the defendant was her husband, that he had gotten out of jail to attend a funeral, and that she had to take him back to jail that evening. After the transaction was completed, he obtained the defendant's driver's license photograph and identified him as the man he had seen at Helmick's home. Agent Morelock additionally made a positive courtroom identification of the defendant as the man who handed him the tablets. He also identified the tape recording of the drug transaction as well as a transcript of the recording, which, he said, had been prepared by a secretary in the drug task force office. He stated that the transcript was fairly good but could have been better, as there were portions of the tape that the secretary had not been able to understand. The tape recording was then admitted as an exhibit and played before the jury. Without objection from defense counsel, the trial court also allowed the State to pass copies of the transcript to the jurors to refer to during the playing of the recording, with the copies then collected and introduced as a collective exhibit. However, prior to the jury's receipt of the transcripts or the playing of the tape, the trial court specifically instructed the jurors that the tape, and not the transcript, was the evidence and that the jurors were to use the transcript only to assist them in listening to the tape.

On cross-examination, Agent Morelock acknowledged that most of his conversation recorded on the audiotape was with Helmick. He conceded, therefore, that the secretary who had prepared the transcript had erroneously attributed some of Helmick's statements to that of an unidentified "man." He further acknowledged that he never negotiated any drug transaction with the defendant and that the defendant had gone back outside the trailer before he paid Helmick for the tablets.

The defendant elected not to testify and rested his case without presenting any evidence. Following deliberations, the jury convicted him of delivery of a Schedule II controlled substance and recommended a \$50,000 fine. At the conclusion of the sentencing hearing, held the same day, the trial court sentenced the defendant as a Range II, multiple offender to an enhanced sentence of ten years in the Department of Correction and a \$50,000 fine, with the sentence to be served consecutively to the six-year sentence the defendant had been serving at the time he committed the offense. The defendant filed a motion for new trial on January 10, 2006, which the trial court overruled on January 13, 2006. On February 7, 2006, the defendant filed a notice of appeal to this court.

ANALYSIS

The defendant raises a number of issues on appeal. The State argues that the defendant's untimely motion for new trial results in his waiver of all issues except those relating to the sufficiency of the evidence and the sentencing imposed. The State further argues that none of the waived issues rises to the level of plain error. We agree with the State.

Tennessee Rule of Criminal Procedure 33(b) provides that "[a] motion for a new trial shall be made in writing, or if made orally in open court shall be reduced to writing, within thirty days of the date the order of sentence is entered. The Court shall upon motion allow amendments liberally until the day of the hearing of the motion for a new trial." Because the provision is mandatory, the time for filing a motion for new trial may not be extended. See Tenn. R. Crim. P. 45(b) (specifically excluding time for filing of a motion for a new trial from those time periods which the court may, in its discretion, extend); see also State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997); State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). The thirty-day provision is jurisdictional, making the trial court's erroneous consideration of an untimely filed motion a nullity and preventing the defendant from raising on appeal any issues which should have been raised in the motion for a new trial. Martin, 940 S.W.2d at 569; Dodson, 780 S.W.2d at 780. Unlike the untimely filing of the notice of appeal, this court does not have the authority to waive the untimely filing of a motion for new trial. State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980); see also Tenn. R. App. P. 4(a).

At the conclusion of the December 7, 2005, sentencing hearing, defense counsel indicated to the trial court that he intended to file a motion for new trial. However, the written motion was not filed until January 10, 2006, and was therefore untimely. As such, all issues are waived except the sufficiency of the evidence and sentencing. See State v. Boxley, 76 S.W.3d 381, 390 (Tenn. Crim. App. 2001). Nonetheless, we may, in an appropriate case, consider such issues under the doctrine of plain error. Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." When determining whether such a review is appropriate, the following factors must be established:

“(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] ‘necessary to do substantial justice.’”

State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). In addition, “[a]ll five factors must be established by the record before” an appellate court may “recognize the existence of plain error, and complete consideration

of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” Id. (citing State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000)).

As the State points out, the defendant failed to raise contemporaneous objections to his appearance in prison clothing, the introduction of the tape recording, or the use of the transcript at trial. Moreover, he did not raise the State’s failure to disclose the last name of the confidential informant as an issue in his motion for new trial, and he has failed to show how not having the last name of the confidential informant, or information regarding the informant’s alleged plea agreement with the State, prejudiced the outcome of his trial.² We, therefore, agree with the State that none of the defendant’s waived issues rises to the level of plain error. Accordingly, we will review only the sufficiency of the evidence and the sentence imposed.

I. Sufficiency of the Evidence

The defendant contends that the evidence was insufficient to sustain his conviction for delivery of a controlled substance. He argues that the evidence at most supports a conviction for facilitation, but “facilitation was not even charged in the presentment.” The State argues that the defendant has waived the issue by his failure to cite any authorities in support of his argument. In the alternative, the State argues that the evidence at trial clearly supports the defendant’s conviction.

When the sufficiency of the convicting evidence is challenged, our task is to consider “whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

²Defense counsel knew the last name of the confidential informant by the time of trial, as he attempted to question Agent Morelock about whether “Roger Collins” was the informant who had put him in touch with the defendant’s wife. Agent Morelock declined to confirm whether Collins was his informant, and the trial court sustained the State’s objection to the line of questioning on the grounds that it was irrelevant. In his brief, the defendant asserts that the State agreed to dismiss Collins’ pending DUI charges in exchange for Collins’ introduction of Agent Morelock to the defendant’s wife, and argues that it “could very well have been beneficial to the defendant” for the jury to have been informed of such an agreement. However, the jury’s knowledge that Collins had a motive to introduce Agent Morelock to Helmick would not have altered the facts upon which the defendant’s conviction was based; namely, that Agent Morelock negotiated to purchase twenty Oxycontin tablets from Helmick and the defendant physically handed the tablets to Agent Morelock upon the completion of the negotiation.

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Tennessee Code Annotated section 39-17-417(a)(2), (c)(2) (Supp. 2004) makes it a Class C felony for a defendant to knowingly deliver a Schedule II controlled substance. Oxycodone is a Schedule II controlled substance. Tenn. Code Ann. § 39-17-408(b)(1)(N) (2003). “‘Deliver’ or ‘delivery’ means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.” Id. § 39-17-402(6). Agent Morelock testified that when he confirmed to the defendant’s wife that he wanted to purchase “Oxy’s,” she called out to the defendant, who came into the trailer and went into the back bedroom with her to count out the tablets. When the two returned, the defendant handed Agent Morelock twenty Oxycontin tablets, which, according to the TBI’s forensic chemist, contained the Schedule II controlled substance of Oxycodone. This evidence was more than sufficient for the jury to find the defendant guilty of the delivery of a Schedule II controlled substance.

We also note that there is no requirement that lesser-included offenses be charged in the presentment. The trial court’s charge to the jury is not included in the record before this court, but the trial court clearly announced its intention of including facilitation of a felony as a lesser-included offense in its charge to the jury. It is the defendant’s duty to prepare a fair, accurate, and complete record on appeal, see Tenn. R. App. P. 24(b), and when necessary parts of the record are not included, we must presume that the trial court’s ruling was correct. See State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Thus, we presume that the trial court instructed the jury on facilitation as a lesser-included offense but that the jury nevertheless found the defendant guilty of the greater, indicted offense. As there was ample evidence in the record to support the jury’s findings, we affirm the defendant’s conviction for delivery of a Schedule II controlled substance.

II. Sentencing

The defendant also contends that the trial court imposed an excessive sentence. When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is “conditioned upon the affirmative showing in the record that the trial court

considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). However, this court is required to give great weight to the trial court’s determination of controverted facts as the trial court’s determination of these facts is predicated upon the witnesses’ demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused’s potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169.

After considering the defendant’s presentence report and the circumstances of the crime, the trial court found the following enhancement factors applicable to the offense: the defendant’s previous history of criminal convictions or criminal behavior in addition to those necessary to establish his range; the defendant’s previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and the fact that the felony was committed while the defendant was on release from a prior felony conviction. See Tenn. Code Ann. § 40-35-114(2), (9), (14)(E) (2003).³ The trial court found no applicable mitigating factors and therefore enhanced the defendant’s sentence from six years, the presumptive minimum in the range for a Range II offender convicted of a Class C felony, to ten years, the maximum in the range. See Tenn. Code Ann. § 40-35-112(b)(3) (2003).

The defendant asserts that the trial court erroneously considered unresolved and dismissed misdemeanor charges, as well as the same felony convictions on which the State had relied to establish his classification as a Range II offender, when applying the enhancement factor that he has a previous history of criminal convictions or criminal behavior. He does not contest the trial court’s application of the other two enhancement factors, other than to note that the “release into the community” he enjoyed at the time of the offense was “simply a temporary permission” for him “to attend the funeral of his stepson.”

³ We cite to the statute in effect at the time of the sentencing hearing. The enhancement factors have since been altered slightly and renumbered. See Tenn. Code Ann. § 40-35-114(1), (8), (13) (Supp. 2005).

The record does not support the defendant's contentions. The defendant's prior record covers three full pages of his presentence report and includes numerous charges that were dismissed or nollied. However, it also includes a number of charges that resulted in convictions, including convictions for possession of Schedule II and Schedule VI controlled substances with the intent to sell, assault, public intoxication, secreting the goods of another, DUI, and speeding. The transcript reveals that the trial court specifically excluded the felony convictions used to establish the defendant's range, as well as the dismissed criminal charges and numerous minor traffic offenses, when considering whether the defendant had a previous history of criminal convictions or criminal behavior. The trial court considered the felony convictions used to establish the defendant's range only as they related to his release status at the time of the instant offense. The trial court stated, in pertinent part:

Number two is applicable. It says that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. I spoke earlier about the ones that the state used to establish the appropriate range, so those can't be used to enhance within the range. Those were the convictions for which you were in jail serving your sentence when the jail gave you a furlough to go to the funeral, so those can't be used.

Finding no applicable mitigating factors and according strong weight to the applicable enhancement factors, the trial court sentenced the defendant to the maximum sentence in his range. The record supports these sentencing determinations. We, therefore, affirm the ten-year sentence imposed by the trial court.

CONCLUSION

We conclude that the defendant's untimely filing of his motion for new trial has resulted in the waiver of all issues on appeal except the sufficiency of the evidence and the sentence imposed. We further conclude that the evidence was more than sufficient to sustain the jury's verdict and that the trial court did not err in sentencing the defendant to ten years as a Range II offender. Accordingly, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE